No. 86-421 (7)

In The Supreme Court of the United States

October Term, 1986

BOARD OF DIRECTORS OF ROTARY INTERNATIONAL, et al.,

Appellants,

vs.

ROTARY CLUB OF DUARTE, et al.

Appellees.

Appeal from the Court of Appeal
of the State of California,
Second Appellate District

BRIEF OF KIWANIS INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF JURISDICTIONAL STATEMENT

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INTEREST OF KIWANIS INTERNATIONAL

Kiwanis International is an organization dedicated to providing community service, similar to the appellant Rotary International. Kiwanis International charters local Kiwanis Clubs and authorizes their use of the Kiwanis name and trademarks. There are some 8,200 Kiwanis Clubs which, in turn, are comprised of approximately 313,000 members throughout the United States and 75 foreign countries.

Like appellant Rotary International, no individual belongs to Kiwanis International. Rather, individuals belong to a local Kiwanis Club and the clubs in turn belong to Kiwanis International. In 1984, the members of local Kiwanis Clubs volunteered approximately 22 million hours of time for community service and raised approximately $41.4 million for charity.

Members of Kiwanis Clubs are chosen only by the individual clubs themselves, and membership is highly selective. Like Rotary Clubs, membership is limited to men only and is by invitation only. Other criteria prospective members must satisfy include:

1. Being of good character and community standing, and either residing in or having other community interests within the area of the chartered club;

2. Being engaged in or retired from an occupation in a recognized line of business, vocation, agricultural, or institutional or professional life;

3. Being unaffiliated with any other service club of like character; and

4. Agreeing to participate regularly in the activities of the club.

Local Kiwanis Clubs may impose their own additional criteria, such as requiring prayer and recitation of the pledge of allegiance at meetings. An active club member must nominate an individual for consideration as a new member, and the board of directors of the local club must approve the prospective member before an invitation is extended. Like Rotary, membership in a Kiwanis Club is not transferable between clubs.

Since the first Kiwanis Club was founded on January 21, 1915, Kiwanis Clubs have limited their membership to men only. Resolutions to amend the Constitution and Bylaws of Kiwanis International to permit female members have been presented at international conventions of Kiwanis Clubs

several times in the past ten years. After considerable debate, all of these resolutions have been rejected by majorities of the delegates attending the conventions. Most recently, at the international conventions of Kiwanis Clubs in July, 1985 and again in July, 1986, such a resolution was presented to the delegates for consideration. After lengthy debate, the resolution was rejected on both occasions.

Kiwanis International has been and currently is involved in litigation arising out of factual situations similar to that of this case. *See, e.g., Kiwanis Int'l v. Ridgewood Kiwanis Club,* 627 F. Supp. 1381 (D.N.J. 1986), *appeal pending,* Nos. 86-5199, 86-5278 (3d Cir.); *Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis Int'l,* 83 Misc. 2d 1075, 374 N.Y.S.2d 265 (1975), *aff'd,* 52 A.D.2d 906, 383 N.Y.S.2d 383 (1976), *aff'd,* 41 N.Y.2d 1034, 395 N.Y.S.2d 633, *cert. denied,* 434 U.S. 859 (1977). There are 584 Kiwanis Clubs in California with more than 22,000 members. The decision below involving Rotary directly threatens litigation against these Kiwanis Clubs and Kiwanis International on the ground that their male membership criterion violates California's Unruh Act. Since that decision, Kiwanis International has repeatedly been contacted by local clubs in California and their members, asking whether the decision and Act apply to Kiwanis, whether Kiwanis International will waive the male-only charter requirement for California Clubs (which it has no legal authority to do without approval by delegate vote at an international convention of clubs), and whether such clubs and their members may be exposed to punitive or other damages if they abide by their charter obligations to Kiwanis International. Kiwanis International has a further interest in that several other States have statutes susceptible of similarly expansive judicial constructions, in which instances the constitutional issues presented here likewise arise. *See, e.g., Kiwanis Int'l v. Ridgewood Kiwanis Club,* 627 F. Supp. at 1388-90; *Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis Int'l,* 395 N.Y.S.2d at 633; *Lloyd Lions Club of Portland, Oregon v. The Int'l Ass'n of Lions Clubs,*

No. A8206-03941, slip op. (Or. Ct. App., Sept. 10, 1986).

THE QUESTIONS ARE SUBSTANTIAL AND MERIT PLENARY REVIEW[1]

This case is worthy of plenary consideration for several reasons – the importance of the First Amendment associational rights involved, the number of people and organizations affected by the issues, the number of States with similar statutes, and the substantial gloss placed upon *Roberts v. United States Jaycees,* 468 U.S. 609 (1984), by the court below.

Millions of Americans belong to private voluntary organizations organized along gender lines. Approximately 36 States have public accommodation laws similar to California's Unruh Act, and many of those statutes are susceptible of an expansive construction like that given to California's in this case. Much litigation has already occurred involving the same or similar issues as are presented in this case, and much more may confidently be predicted absent further guidance by this Court on the First Amendment rights of association presented.

The decision of the California court in this case gives lip service at best to most of the factors identified by this Court

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[1]The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(2). [Jurisdictional Statement, p. 2] It is difficult to judge from the Jurisdictional Statement at pp. 4-5 and the decision below, *see Rotary Club of Duarte v. Board of Directors of Rotary Int'l,* 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213, 229 (1986), whether appellants presented the issue to the California courts in such a manner as to give rise to a right of appeal under § 1257(2). *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 113-14 (6th ed. 1986). If the Court determines that appellate jurisdiction does not lie pursuant § 1257(2), Kiwanis International respectfully urges the Court to consider the Jurisdictional Statement as a petition for writ of certiorari and to grant certiorari pursuant to 28 U.S.C. §§ 1257(3), 2103.

in *Roberts* as essential to the assessment of First Amendment rights of intimate association, and it fundamentally alters the focus of the one factor it emphasizes. The decision below likewise departs from this Court's test for assessing abridgement of the expressive aspects of the right of association, essentially demanding proof that the State-imposed membership criterion will cause the organization to disintegrate.

Finally, California's Unruh Act as construed by the courts of that State in this and other cases fails the standards for vagueness and overbreadth employed by this Court in *Roberts*. People of common or even superior intelligence must necessarily guess both at the meaning of "business establishment" as that term has been defined by the California courts, and at what membership criteria those courts will henceforth condemn as "arbitrary."

I. This Case Presents Substantial Questions Under The First Amendment Arising Out Of A Recurring Fact Pattern And Of Vital Importance To Millions Of Americans.

This case presents both the opportunity and the need for this Court to complement its earlier decision respecting rights of associational freedom under the First Amendment. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). In particular, on the broad spectrum of human associational relationships, *Roberts* mapped with clarity the polar extremes where the State may and may not intrude consistently with the First Amendment. 468 U.S. at 618-20. At the same time, *Roberts* noted a "broad range" of relationships between those extremes. That case did not require the Court to "mark the potentially significant points on this terrain with any precision," and the Court "note[d] only [some] of the factors that may be relevant . . . ." *Id.* at 620. By complementing the decision in *Roberts*, the Court would discharge its duty to provide clear guidance to lower courts, members of the bar, and citizens of the United States on the extent of what many

of them historically have believed and continue to believe is one of our Nation's basic freedoms.

Millions of Americans have historically chosen and continue to choose to devote substantial portions of their lives and efforts to voluntary groups organized for a broad array of purposes, from relatively well-known service clubs such as Rotary and Kiwanis, to fraternal organizations such as the Elks, Moose and various Masonic orders, to national and local ethnic and nationality organizations, to relatively obscure and local social and recreational clubs. For many if not most of these groups and their members, the ability to choose their associates is an essential component of this voluntarism, and a wide range of selective membership criteria is utilized, from age and residence to profession or occupation to religion, nationality and ethnic background. *See generally, Encyclopedia of Associations* (19th ed. 1984). These private and voluntary organizations historically have made and continue to make a substantial contribution to the richness and diversity of American social, cultural and civic society.

Many of these groups have used and continue to use gender as a membership criterion. For each service club such as Rotary and Kiwanis which limits its membership to males, there is or is likely to be a Junior League or Zonta that limits its membership to females. Indeed, the *Encyclopedia of Associations* (19th ed. 1984) lists as many as 68 service organizations alone that are open only to one sex. This "service" category does not include nationwide fraternal organizations such as the Shriners (male), the various other Masonic orders (one sex or the other) and the General Federation of Women's Clubs (female), or local organizations such as the Cosmos Club (male) and the Congressional Club (female), let alone a wide variety of other social, recreational, ethnic and political clubs.[2] These groups and their members are vitally interested in the First Amendment associational issues presented in this case. California's Unruh Act, as construed and applied by

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[2] Of course, the Congress of the United States has frequently

(Footnote continued on the following page)

the California courts in this and earlier cases, tests the limits of governmental power to outlaw diversity and pluralism by dictating to the members of these private groups who their associates shall be.

According to one relatively recent compilation, 36 States have enacted statutes proscribing gender discrimination in places of public accommodation. Note, Roberts v. United States Jaycees: *Discriminatory Membership Policy of a National Organization Held Not Protected By First Amendment Freedom of Association*, 34 Cath. U.L. Rev. 1055, 1070 n.104 (1985). Many of these statutes are susceptible as a matter of state law to an expansive construction like that given to the Unruh Act by the court below. *See, e.g., Kiwanis Int'l v. Ridgewood Kiwanis Club*, 627 F. Supp. 1381, 1385-87 (D.N.J. 1986), *appeal pending*, Nos. 85-4306, 85-4483 (3d Cir.); *Lloyd Lions Club of Portland, Oregon v. The Int'l Ass'n of Lions Clubs*, No. A8206-03941, slip op. (Or. Ct. App., Sept. 10, 1986). These States, and the courts of these States, also have an interest in knowing the constitutional limitations on the application of these statutes.

This case also presents a recurring fact pattern, out of which there has been and continues to be litigation. Many private service and other clubs are associated with other clubs at a national or international level. Facts essentially the same as those of this case arise whenever a local club admits a male or female member contrary to the provisions of its charter from the national organization. Litigation then frequently follows when the national organization revokes or threatens to revoke the charter of the lo-

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2 *(Continued)*

chartered private, single-sex organizations at the national level. *See, e.g.*, 36 U.S.C. § 21, *et seq.* (Boy Scouts of America); 36 U.S.C. § 31, *et seq.* (Girl Scouts of America); 36 U.S.C. § 78, *et seq.* (Ladies of the Grand Army of the Republic); 36 U.S.C. § 91, *et seq.* (American War Mothers).

cal club, with the local club resisting revocation by claiming that it is bound by State law not to use the gender criterion specified by its charter. *See, e.g., Kiwanis Int'l v. Ridgewood Kiwanis Club*, 627 F. Supp. at 1385-86; *Lloyd Lions Club of Portland Oregon v. The Int'l Ass'n of Lions Clubs*, No. A8206-03941, slip op. (Or. Ct. App., Sept. 10, 1986); Note, Roberts v. United States Jaycees: *Discriminatory Membership Policy Of A National Organization Held Not Protected By First Amendment Freedom Of Association*, 34 Cath. U.L. Rev. 1055, 1068 n.100 (1985) (collecting cases). Moreover, after the decision below, suits against local clubs directly may certainly be expected. Thus, the Court can reasonably anticipate that the constitutional issues presented by this case will arise often in the future, and this Court's guidance on these issues is necessary.

II. The Decision Below Fundamentally Alters The Standards Announced By This Court For Assessing Rights Of Intimate Association Under The First Amendment.

Discussing the types of personal affiliations entitled to the protection of freedom of intimate association against state interference, in *Roberts v. United States Jaycees* this Court wrote:

> [T]hey are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. Conversely, an association lacking these qualities – such as a large business enterprise – seems remote from the concerns giving rise to this constitutional protection.

468 U.S. at 620. This Court further stated that "[d]etermining

the limits of state authority over an individual's freedom to enter into a particular association . . . unavoidably entails a *careful assessment* of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments", and that the "factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Id.* (emphasis added).

Any "careful assessment" of those factors in the case at bar demonstrates that the freedom of intimate association protects local Rotary Clubs against the application of the Unruh Act. With regard to the relative size of Rotary Clubs, as noted in the Jurisdictional Statement, there are approximately 19,788 local clubs with a total membership of approximately 907,750. [Jurisdictional Statement, pp. 9-10] Membership in local clubs thus averages 46 men, and those local clubs exclusively select their own members. At the time Rotary International revoked its charter, the Duarte Club's membership was comprised of 21 people.

Given the small size of the local clubs, it is not surprising that the clubs are highly selective in their decisions to accept new members. A person must be invited to join a local Rotary Club as the clubs neither solicit from nor extend membership to the public generally. The number of members a local club can have from any single line of business or profession is also limited. Moreover, an active member must work in a leadership capacity in his business or professional classification and must work or live within the club's territory.

Rotary also has an elaborate procedure for selecting members. A candidate's name must be submitted to the local club by the membership committee or by a member. The candidate's name is submitted to the local club's board of directors, which forwards the name to a classifications committee and membership committee. The classifications committee ensures that the addition of the proposed member will not cause the club to exceed the maximum number of members the club

may have from any single line of business and that the proper classification has been selected. The membership committee evaluates the candidate's character, business and social standing, and general eligibility. If the classification and membership committees support the application, the candidate's name, business, and classification are published to the members. If no member files a written objection with the board of directors within ten days, the candidate becomes a member. If a member makes an objection, the board of directors must approve the candidate's membership with an additional vote. A more selective procedure for new members is difficult to imagine.

Membership in Rotary is also characterized by seclusion from nonmembers in critical aspects of the membership. For example, as noted in the Jurisdictional Statement, Rotary meetings are not open to the public; joint meetings with other service clubs are opposed; and Rotarians are discouraged from joining other service clubs. Finally, membership in a local Rotary Club is not transferable to any other Rotary Club.

Rather than "careful[ly] assess[ing]" the factors specified in *Roberts*, 468 U.S. at 620, in light of the above undisputed facts pertaining to Rotary, the California Court of Appeal simply ignored most of them, and it fundamentally altered the focus of the one factor – size – that it emphasized. With regard to the size criterion, the California court stated that "the immense size of *International* and the number of Rotarians throughout the world is hardly indicative of an intimate relationship." *Rotary Club of Duarte v. Board of Directors of Rotary Int'l*, 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213, 230 (1986)(emphasis added). In *Roberts*, however, this Court focused on the fact "that the *local* chapters of the Jaycees are large and basically unselective groups," noting that "the Minneapolis chapter had approximately 430 members, while the St. Paul chapter had about 400." *Roberts v. United States Jaycees*, 468 U.S. at 621 (emphasis added). The local Rotary Clubs are approximately one-tenth the size of the Jaycees'

clubs involved in *Roberts*.

Moreover, it is analytically preposterous and denigrates the interests in intimate association actually involved to focus upon Rotary International – an association of local Rotary Clubs of which no natural person is a member – rather than the local club itself. It is the *local* club that selects the persons who are its members. It is the members of the *local* club who associate with each other on a daily and weekly basis and to whom size, selectivity, personal friendship and congeniality are important. It is these "human relationships" at the local level that pose the limits of governmental authority to intrude, and it is these 40 person groups who are subject to the dictates of the Unruh Act – *and* to suits by persons challenging their membership criteria – under the California court's construction of that Act. In short, when evaluating the size criterion, the court below focused on the wrong entity.[3]

The California court also rejected Rotary's claim to freedom of intimate association because "while fellowship and service to the community play a very important part in the Rotary organization, the business benefits and commercial advantages to be gained are also clearly an inducement for the business and professional leaders of the community to join." 224 Cal. Rptr. at 230. In *Roberts*, however, this Court did

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[3] It is true, of course, that on the facts of this case it was the 21 members of the local Club who decided to admit women members. It is equally true that those 21 persons in Duarte, California are perfectly free to create, join and participate in a local organization with whatever membership criteria they wish. What they are not perfectly free to do, however, is to call any such local group a Rotary Club, to use the Rotary name and trademarks, and to have their organization participate in the international association of Rotary Clubs. It is only because the *local* Club was held subject to the dictates of the Unruh Act that the court below could enjoin Rotary International from enforcing its rights with respect to the Duarte Club's charter. Every other *local* Rotary Club in California is now legally disabled from enforcing its male membership criterion. *Those* are the intimate

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not identify the motives of particular members as a factor determining whether or not a group is entitled to freedom of intimate association. Surely no one would argue that the State can interfere with a person's choice of whom to marry upon a showing that either of the two spouses was "marrying for money." *See Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis Int'l*, 83 Misc. 2d 1075, 374 N.Y.S.2d 265, 268 (1975) ("activities or motives of some individual members [do not] . . . convert such organization itself into a commercial enterprise"), *aff'd*, 52 A.D.2d 1075, 383 N.Y.S.2d 383 (1976), *aff'd*, 41 N.Y.2d 1034, 395 N.Y.S.2d 633, *cert. denied*, 434 U.S. 859 (1977).

Finally, the California Court of Appeal nowhere addressed the other two factors identified in *Roberts*: (1) selectivity in beginning the relationship and (2) seclusion from others in critical points in the relationship. Rather, it reasoned that, by requiring Rotarians temporarily absent from the locality to make up missed meetings by attending the meeting of another club, Rotary encourages congeniality on a worldwide level. 224 Cal. Rptr. at 230. This is tantamount to depriving a family of freedom of intimate association because of occasional visits to or from second cousins.

The decision below simply either misapplies or fails to apply the factors set forth by this Court in *Roberts*. In lieu thereof, the California court substituted its judgment on the appropriate analysis of a First Amendment case for that of this Court.

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human relationships and the "deeply felt choices of associational preference of many Rotarians," found as a fact by the state trial court and undisturbed by the Court of Appeal, 224 Cal. Rptr. at 228, that are "material[ly] interfer[ed] with" by application of the Unruh Act. *Id.*

III. The Decision Below Also Departs From This Court's Analysis Of The Expressive Aspects Of First Amendment Associational Freedom.

This Court has had the opportunity on several occasions to reaffirm that charitable and similar activities are entitled to First Amendment protection. For example, in *Roberts*, the Court wrote that "members of the Jaycees regularly engage in a variety of civic, charitable, lobbying, fund-raising and other activities worthy of constitutional protection under the First Amendment . . . ." 468 U.S. at 626-27. *Accord, e.g., Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S.___, 87 L.Ed.2d 567, 577 (1985) (" 'charitable appeals for funds, on the street or door to door, involve a variety of speech interests – communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes – that are within the protection of the First Amendment' " citation omitted). Thus the freedom of expressive association guaranteed to Rotary by the First Amendment "is plainly implicated in this case." *Roberts*, 468 U.S. at 622.

In determining that the Minnesota statute in *Roberts* did not impermissibly abridge the Jaycees' "right to associate for expressive purposes," 468 U.S. at 623, the Court employed a two-prong test. First, the Jaycees had "failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association." 468 U.S. at 626. The Court determined that there was "no basis in the record for concluding that admission of women as full voting members [would] impede the organization's ability to engage in these protected activities . . . ." *Id.* at 627. Second, with respect to any "incidental abridgment of the Jaycees' protected speech," the "effect" of the statute was "no greater than is necessary to accomplish the State's legitimate purposes." *Id.* at 628.

In the instant case, the California Court of Appeal essentially elides in its constitutional analysis the first prong of

the *Roberts* test for abridgment, and rather addresses only the second, "state interest/least restrictive means," prong. *See* 224 Cal. Rptr. at 231. Under that approach, of course, the result is a foregone conclusion. *See id. Cf. Roberts v. United States Jaycees*, 468 U.S. at 635 (O'Connor, J., concurring)("an association should be characterized as commercial, and therefore subject to rationally related state regulation of its membership and other associational activities, when, and only when, the association's activities are not predominately of the type protected by the First Amendment").

So far as the court below addressed (in a non-constitutional portion of its opinion) the first issue posed by this Court's analysis in *Roberts* – *i.e.*, the record with respect to "imped[ing] the organization's ability to engage in . . .protected activities," 468 U.S. at 627 – it noted the trial court's finding, supported by the record:

> [T]hat the continued successful worldwide operation of Rotary is materially dependent on a delicate balance of divergent attitudes in diverse cultures, and that judicial interference with this balance, as reflected by the votes in Rotary's Council on Legislation, would risk a material and harmful disruption of the existing cooperative integrity of Rotary International both inside and outside the State of California.

224 Cal. Rptr. at 228. The Court of Appeal then merely rejoined that this "does not support a finding that the admission of women *into the local Rotary Club of Duarte would cause the downfall of the District or International or seriously interfere with Rotary's objectives.*" *Id.* (emphasis added).

It blinks both substance and reality to suggest that the effect upon the First Amendment right of *expressive* association is to be judged by the "admission of women into the local Rotary Club of Duarte . . . ." The "imped[iment]" to Rotary's "ability to engage in these protected activities," *Roberts*, 468 U.S. at 627, which as a matter of undisputed fact involve world-wide activities and a "delicate balance of

divergent attitudes in diverse cultures," 224 Cal. Rptr. at 228, must be measured by the real result decreed by that court's opinion – *i.e.*, that *all* local Rotary Clubs in California must admit women (as, indeed, under that court's constitutional analysis, must all clubs in other States having comparable state law requirements). Furthermore, under the California court's analysis, the only way to satisfy the burden is to prove that State imposition of the membership requirement will cause the organization to *collapse*. It seems quite doubtful that this draconian level of proof is what this Court meant by a "demonstrat[ion of] . . .serious burdens on the male members' freedom of expressive association" and a "record [showing] . . .that admission of women . . .will impede the organization's ability to engage in . . .protected activities. . . ." 468 U.S. at 626, 627. Plenary review is warranted to consider and clarify this point alone.

IV. The Unruh Act As Construed By California Courts Is Impermissibly Vague And Overbroad As To Both The Organizations Covered And The Membership Criteria Proscribed As "Arbitrary".

Starting with a statute which proscribes discrimination on the basis of sex, race, color, religion, ancestry, or national origin in all "business establishments," the California courts have held: (1) not only that local Rotary Clubs are "business establishments" but so too are the Boy Scouts and a local Boys' Club; (2) not only does the Unruh Act proscribe the types of discrimination it enumerates, but also any form of discrimination a court of that State condemns as "arbitrary," including barring a homosexual from a leadership position in the Boy Scouts; and (3) that the First Amendment does not shelter any of these private organizations from such State-imposed intrusions upon their members. *See Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal. 3d 72, 219 Cal. Rptr. 150, 707 P.2d 212 (1985); *Curran v. Mt. Diablo Council of the Boy Scouts of America*, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983),

appeal dismissed for want of final judgment, 468 U.S. 1205 (1984).

In *Roberts,* this Court described the void-for-vagueness doctrine in the following terms:

> [A] statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

468 U.S. at 629 (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1925)). This Court had "little trouble concluding that these concerns [were] not seriously implicated by the Minnesota Act," in significant part because the highest court of that State had placed a limiting construction involving "a number of objective and specific criteria" upon the statute's sweep and had further suggested that "the Kiwanis Club might be sufficiently 'private' to be outside the scope of the Act." 468 U.S. at 629-30.

> "[W]e read the illustrative reference to the Kiwanis Club, which the record indicates has a formal procedure for choosing members on the basis of specific and selective criteria, as . . . providing a further refinement of the standards used to determine whether an organization is "public" or "private."

468 U.S. at 630.

The California courts have imposed no such limiting construction on the sweep of the Unruh Act, but rather have taken a reasonably definite standard – "business establishment" – and rendered it unknowable until the next court decision. People of common intelligence would not expect the Boy Scouts or the Boys' Club to satisfy the definition of "business establishment." This is equally true for Rotary. The court below found that Rotary is a "business establishment" principally because local Rotary Clubs are linked with each other through a hierarchial structure at the district, national and international level. *See* 224 Cal. Rptr. at 222-24. Does this mean any local group that has links to other similar groups

in a hierarchial structure is a "business establishment" under the Unruh Act and subject to state regulation of its membership on that basis? – the NAACP?; the Shriners?; the ACLU? Similarly, what person of common intelligence can do more than guess what membership criterion the California courts will next determine to be "arbitrary" discrimination? – are Rotary's and Kiwanis' limitations to business or profession and community leadership next on the agenda?

CONCLUSION

The interpretation by California courts of the term "business establishment" as employed in the Unruh Act, and their continuing search for the "arbitrary" membership criteria that they deem proscribed by that Act, can fairly be likened to a river which is raging out of control and has already uprooted the Boy Scouts, the Boys' Clubs and Rotary from their entrenchment in the banks of privacy. Further down the bank, but within the river's path, lie Kiwanis and other private service organizations, the Girl Scouts, the Catholic Youth Organization, fraternal, political and cultural organizations, and countless other private, voluntary associations. At some point, the First Amendment erects a dam to that river, and Kiwanis International respectfully submits that dam was breached by the California court's application of the Unruh Act in this case.

The question is not what values – be it gender equality or any other – shall be or should be enshrined in our public life and government. The question is whether the First Amendment erects a shelter in the form of private and voluntary associations for those who dissent from public values, for those who would strike the balance between competing values somewhat differently, and for those who believe that public values are not seriously impaired by private expression of private associational preferences.

As stated by a state court jurist whose commitment to

the public value of gender equality cannot be questioned but who believed in another case that the Unruh Act was being stretched beyond any reasonable bound:

> By protecting the freedom to base sexual associations on personal affinities, society promotes its pluralism, with all the values that connotes – values such as a diversity of views, a variety of ideas, and preservation of traditions . . . .
>
> The value of a pluralistic, democratic society is that it permits members of each group to join with others sharing their views, to pool their resources as they wish, to seek the resources of new members, and to experiment to try to prove the validity of their respective concepts.

Isbister v. Boys' Club of Santa Cruz, Inc., 219 Cal. Rptr. at 167 (Mosk, J., dissenting).

For these reasons, Kiwanis International as *amicus curiae* respectfully urges that the Court note probable jurisdiction and set this case for plenary consideration.

Respectfully submitted,

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